No. 89-601

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In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

MARIE LUCIE JEAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents' brief in opposition asserts that the government has waived the issue presented in our petition—whether a separate finding that the government's position in the fee litigation was not substantially justified is a necessary prerequisite to an award of fees for the fee litigation—by failing to raise it below. That assertion is simply incorrect. The issue was raised in the district court and preserved in the court of appeals.

In the March 7, 1986, hearing on respondents' application for an award of attorneys' fees, government counsel asserted (2 Resp. C. A. App., Tab. 8, at 128):

> [H]ours expended on the fee application itself should be deleted from consideration of fees in this case.
>
> The Government's long-standing position on that score is that there is another test, and that is whether the Government's defense of the fee application was a reasonable one.

> To find that it was not, or to find that the Government's defense of the fee application is not substantially justified would require no less than that I come in here and concede everything in the application.
>
> We don't see that there is another way around that, and we believe that the fee application hours have to be deleted from the fee application.

Similarly, the government's Proposed Findings of Fact and Conclusions Of Law submitted on May 12, 1986, stated (at 39 para. 29):

> Time expended on preparing and pursuing a fee award is not compensable under EAJA unless the government's defense of the fee question is "not substantially justified." Fee litigation must be considered a separate entity from the litigation which engendered it and is subject to separate analysis.

The issue was also preserved on appeal. The government's opening appeal brief discussed the issue (at 53-54), noting that the district court's reliance (Pet. App. 84a) on a statement in *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986), overlooked the fact that that portion of the *Haitian Refugee Center* case had been vacated in *Haitian Refugee Center* v. *Meese*, 804 F.2d 1573, 1574 (11th Cir. 1986).[1] In light of what the brief characterized as the latter decision's "*sub silentio* adoption of the rule • • • that a plaintiff is not entitled to fees under EAJA for time spent on a fee petition, unless the government's defense to that fee petition lacked substantial justification," the brief proceeded to contend that no fees for work on the fee application were appropriate here, because "[o]ur position in response to [respondents'] fee application • • • plainly meets the substantial justification test" (Gov't C.A. Br. 54). See also Gov't C.A. Reply Br. 21-24.

[1] The court of appeals recognized the accuracy of that assertion. Pet. App. 38a.

In the court of appeals, respondents advanced the identical waiver argument they present to this Court.[2] The court of appeals found that argument unworthy of discussion, and addressed the merits of our "fees for fees" argument. Pet. App. 37a-41a. This Court should also consider our argument on the merits.

2. Respondents contend that the 1985 Amendments to EAJA have eliminated the pre-existing conflict in the circuits on the fees for fees issue. They nevertheless concede (Br. in Opp. 5 n.*) that two circuits have since 1985 reaffirmed their prior positions—which are inconsistent with the result reached by the court of appeals in this case. The conflict therefore persists. That is hardly surprising, since the change in EAJA upon which respondents rely is not relevant to the fees for fees issue.[3]

3. Finally, respondents cite and append (Br. in Opp. App. 1a-10a) a pending bill, The Legal Fees Equity Act of 1989 (S. 90, 101st Cong., 1st Sess. (1989)), which they contend "would resolve the issue of 'fees for fees' " (Br. in Opp. 6). Respondents do not explain the relevance of the provision on which they rely (§ 5(2)(A)), which simply requires that the party seeking fees must show that the work for which an award is sought was performed "in connection

[2] There, as here, respondents relied on the district court's statement (Pet. App. 85a) that the government did not challenge the "fees, costs, or expenses." In context, what the district court apparently meant by this statement was only that the government did not contest the *amounts* claimed, as distinct from objecting to an award of fees for fees at all.

[3] The 1985 Amendments clarified the definition of "position of the United States" to include not only the government's position in the "civil action," but also "the action or failure to act by the agency upon which the civil action is based." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 2(c)(2)(B), 99 Stat. 185. The addition obviously has no effect on the question of the proper way to treat work on the fee application, which has nothing to do with the underlying agency action.

with issues upon which the party prevailed" (Br. in Opp. App. 6a), and thus would apparently codify the apportionment rule of *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). Accordingly, even if the proposed bill were enacted, it would not affect the issue presented in our petition.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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